No. 13,602

United States Court of Appeals
For the Ninth Circuit

JAMES V. McCONNELL and
MARGOT MURPHY McCONNELL,
Appellants,

vs.

PICKERING LUMBER CORPORATION,
Appellee.

APPELLANTS' OPENING BRIEF.

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STATEMENT OF JURISDICTION.

1. Jurisdiction of District Court.

The complaint and amended complaint alleged that appellants are citizens of New York; appellee is a Delaware corporation; and the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. (Tr. pp. 3, 29.) The answer to the amended complaint admitted said facts. (Tr. p. 42.)

The District Court had original jurisdiction based on diversity of citizenship. 28 U.S.C. section 1332.

2. Jurisdiction of Court of Appeals.

This appeal is taken from a judgment of dismissal entered September 16, 1952 (Tr. pp. 77-78), wherein

appellee's motion to dismiss the amended complaint on the ground that it failed to state a claim was granted with prejudice and a judgment for costs was rendered in favor of appellee. The notice of appeal was filed October 15, 1952 (Tr. p. 79), within the time limited by 28 U.S.C. section 2107.

The judgment of dismissal constituted an adjudication upon the merits. Federal Rules of Civil Procedure, Rule 41 (c). It was a final decision by the District Court and jurisdiction of this appeal is conferred upon this court by 28 U.S.C. sections 1291 and 1294 (1).

PROCEEDINGS IN THE DISTRICT COURT.

Appellee moved to dismiss the original complaint under Rule 12 (b) (6) for failure to state a claim on which relief can be granted. (Tr. p. 25.) On November 7, 1951 the District Court granted the motion and dismissed the complaint on contract because "I do not find an ambiguity in the contract." The Court held the averments insufficient to permit reformation but granted leave to file an amended complaint for reformation. (Tr. pp. 26, 27.)

Appellants moved to vacate the order of November 7, 1951, and lodged with the Court their proposed amended complaint, *which was identical with the original complaint except as to the allegations in paragraph XI thereof concerning reformation.* (Tr. pp. 27-40.)

On January 3, 1952, the District Court granted leave to file the amended complaint and set aside the submission of the motion to vacate its order of November 7, 1951, to be resubmitted with any motion attacking the amended complaint. (Tr. pp. 28, 29.)

On January 25, 1952, appellee moved to dismiss the amended complaint under Rule 12 (b) (6). (Tr. p. 41.)

On March 26, 1952, the District Court entered an order stating, "I believe that a ruling upon the motion to dismiss should be deferred until the trial * * * It is so ordered." (Tr. p. 41.)

Appellee filed its answer to the amended complaint on April 19, 1952. (Tr. pp. 42-45.)

On April 25, 1952, appellants filed a demand for a jury trial on their claim upon the contract without reformation and also as to "all issues of fact" on their claim for reformation. (Tr. p. 46.)

On May 1, 1952, appellee filed a motion to dispense with jury trial on reformation issues. (Tr. p. 46.)

On September 3, 1952, the district judge filed a "memorandum and order" directing a dismissal of the amended complaint and a judgment for appellee (Tr. pp. 47-77), and pursuant thereto, on September 16, 1952, entered a "judgment of dismissal" (Tr. pp. 77, 78) whereby he granted appellee's motion to dismiss the amended complaint (of January 25, 1952); dismissed the amended complaint with prejudice; rendered judgment for appellee and awarded it costs

in the sum of $170.00; and denied appellant's motion to vacate the order of November 7, 1951, dismissing the original complaint.

This appeal is taken from said "judgment of dismissal."

STATEMENT OF THE CASE.

The claim against appellee is to recover the unpaid balance of the purchase price of certain timber lands in Tuolumne County, California, under a written contract. (Tr. pp. 3-24.) The issue involves the meaning and application of a price escalator clause, section 10 of the contract. The amended complaint (Tr. pp. 29-40) sets forth the contract and the opposing interpretations placed upon it by appellants and appellee and asks relief under the contract as written. In the alternative, if the contract is construed as appellee interprets it, appellants allege the contract was executed by them under a mistake on their part as to its meaning and effect which was known or suspected by appellee, and ask reformation for "mistake of one party, which was known or suspected by the other," in accordance with section 3399 of the *Civil Code of California.* The charging allegation of the original and amended complaints in this respect is in the very language of said code section. (Tr. pp. 11, 35, 39.)

The original complaint alleged both mutual mistake and unilateral mistake as a basis for reformation. (Tr. p. 10.) The amended complaint alleged unilateral mis-

take only. These alternative claims are criticized in the "Memorandum and Order" of the District Court as "varying and inconsistent contentions" although the pleading of alternative claims is permitted by Rule 18 (a) of the Federal Rules of Civil Procedure.

The amended complaint and attached contract reveal the following situation:

Appellee corporation was engaged in the lumber business in California. (Tr. p. 30.) Appellee corporation, appellant Margot Murphy McConnell, who resides in New York, and five individuals, all residing in Michigan, held in undivided ownership 154 parcels of timber lands in Tuolumne County, California, aggregating 6172.60 acres. In terms of percentages John F. Ducey owned 36.38 per cent, appellee corporation 20 per cent, appellant Margot McConnell 18.25 per cent and the other four people the remaining 25.37 per cent among them—in other words, three of the seven co-owners held approximately 75 per cent of the property. (Tr. pp. 30-32.) Appellee desired to buy the interests of its co-owners. Appellee prepared the written agreement covering purchase of appellant's interest at an initial price of $75.00 an acre. (Tr. p. 38.) This agreement is dated July 1, 1945, but was signed by appellants April 6, 1946, and by appellee April 10, 1946. It contains the following pricing clause:

> "10-(A)—Should Purchaser at any time prior to July 1, 1950 acquire the 494.8/1360 fractional interest of John F. Ducey in the property listed in Schedule A from him, his heirs or assigns or representatives, directly or indirectly, or at a parti-

> tion sale of all the property described in Schedule A at a price higher than that provided herein for Sellers' interest, then Purchaser and Sellers hereby agree that the price provided in this contract for the Sellers' interest shall forthwith be adjusted upward by the amount necessary to make up the difference." (Tr. p. 32.)

In February, 1949, appellants discovered that appellee had purchased, in December, 1947, the entire 494.8/1360 fractional interest of John F. Ducey in 40 of the 154 parcels "listed in Schedule A" at a price greatly in excess of $75.00 per acre and believed to be approximately $150.00 per acre. Appellee has made no payment to appellants under the price escalator clause (Tr. p. 33) nor has it notified appellants of its purchase from Ducey as required by paragraph (B) of section 10 of the agreement. (Tr. p. 34.)

Appellants are suing here for the difference between $75.00 per acre paid to them and the higher price per acre paid by appellee to John F. Ducey together with interest thereon from the time such payment should have been made as provided in section 10 of the agreement. Appellee's failure to pay is believed to be based on its contention that section 10 of the agreement is completely inoperative because appellee did not acquire, prior to July 1, 1950, the fractional interest of John F. Ducey in all 154 parcels of the property but only in 40 parcels thereof. (Tr. p. 34.)

It is then alleged, in substance, that if the contract is construed to mean that appellee corporation must buy the interest of John F. Ducey in "all" of the pro-

perty listed in Schedule A, then it was executed by appellants under a mistake on their part as to the meaning and effect of the language "the property listed in Schedule A," which mistake was known or suspected by appellee at the time of the execution of the contract. At the time appellants executed said contract it was their understanding that Section 10-(A) meant that they would receive for their interest in the McArthur-Ducey lands an amount equal to the difference between $75.00 per acre and any higher price per acre provided in any agreement between appellee corporation and John F. Ducey, and made prior to July 1, 1950, for the sale of Ducey's interest *in all or any* of said lands. (Tr. p. 35.)

Appellants were induced into this mistake by the following circumstances: After appellee corporation acquired its twenty per cent interest in said lands in July, 1944, and in order for it to cut timber on any of said lands, it began negotiations to buy out the interests of all the other owners. These negotiations were largely carried on between appellants and appellee corporation, and all co-owners, except John F. Ducey, were willing to sell if a fair price could be obtained. In March, 1945, appellant went to Detroit, met with all of her co-owners, and they agreed to sell their interests at a price of $75.00 per acre, which fact was made known to appellee corporation, for in June of that year appellee corporation prepared and submitted a proposed contract at this price (Tr. p. 36) which contained substantially all the provisions of the contract here in issue, except it omitted the pricing clause,

paragraph 10. John F. Ducey refused to sign this contract. Thereupon appellee corporation entered into negotiations with appellants for the purchase of their interest and informed appellants that the acquisition of their interest would improve the corporation's position in the event of a partition suit.

Appellants refused to sell their interest at $75.00 per acre unless protected against the acquisition by appellee corporation of any of the other interests at a higher price per acre. This demand was subsequently narrowed to include only the interest of John F. Ducey because he owned the largest outstanding interest, and because of his past unwillingness to sell. (Tr. p. 37.) In February, 1946, all the other co-owners offered to sell their interests to appellee corporation for $100.00 per acre, which fact was made known to appellants. The same month Ben Johnson, the then president of appellee corporation, proposed to appellants in New York that they enter into two contracts, one at $75.00 per acre which would be shown to the other co-owners, and another at a higher price per acre, which would be a private agreement between them. Appellants refused to consider this. By reason of these negotiations it became apparent to appellants that appellee corporation desired to purchase all outstanding interests in said property and appellants believed it would do so prior to July 1, 1950.

In April, 1946, the parties entered into the contract here in controversy, which contract was prepared and submitted by the appellee corporation.

In July, 1951, appellants discovered that appellee corporation had, prior to July 1, 1950, agreed with all of the other co-owners, except John F. Ducey, to buy all of their interests in all of said lands and that appellants are informed and believed that the prices received by them exceed the sum of $75.00 per acre. (Tr. p. 38.) In paragraph VII it is alleged that in February, 1949, appellants learned that appellee corporation had purchased all of John F. Ducey's interest in 40 of the 154 parcels at a price greatly in excess of $75.00 per acre. It is then alleged that although the contingency of the purchase by appellee corporation of the fractional interest of John F. Ducey in a part of but less than all of said lands was not discussed between appellee corporation and appellants, that appellants, under the terms of the agreement, understood and believed that appellants would receive the difference between $75.00 per acre and any higher price which might be agreed upon between appellee corporation and John F. Ducey at any time prior to July 1, 1950.

The foregoing factual allegations of the circumstances giving rise to appellants' mistake, known or suspected at the time by appellee, were all made pursuant to Rule 9 (b) of the Federal Rules of Civil Procedure. The amended complaint was expanded to include these allegations after the District Court had on November 7, 1951, granted appellee's motion to dismiss the original complaint, with leave only to amend as to the reformation issue. (Tr. pp. 26-27.)

SPECIFICATION OF ERRORS RELIED UPON.

Appellants' statement of the points on which they intend to rely on this appeal are set forth at pages 79, 80, 81 and 84 of the record. They are nine in number but may be summarized as follows:

1. The District Court held that the amended complaint does not state a claim upon which relief can be granted either for breach of the written contract which is incorporated therein, nor, in the alternative, for the reformation of said contract under California Civil Code, section 3399 for a mistake of one party which the other at the time of its execution knew or suspected.

This holding, we contend, was error.

2. The District Court held that the amended complaint shows on its face that the action for reformation is barred by the statute of limitations.

This holding, we contend, was error.

3. In March, 1952, the District Court ordered that a ruling upon appellee's motion to dismiss the amended complaint "be deferred until the trial." Thereafter appellee answered, depositions of the parties were taken and filed and the case was set for trial. In September, 1952, the District Court on its own initiative, without notice, hearing, pretrial conference, or motion for judgment on the pleadings, dismissed the amended complaint with prejudice and entered judgment for appellee.

The dismissal of the amended complaint, we contend, was error.

SUMMARY OF ARGUMENT.

We will show:

1. The amended complaint states a claim for relief upon the contract as written.

2. The amended complaint states a claim on which relief can be granted by way of reformation.

3. The claim for relief by way of reformation was not barred by the statute of limitations.

ARGUMENT.

I. THE AMENDED COMPLAINT STATES A CLAIM FOR RELIEF UPON THE CONTRACT AS WRITTEN.

The claim on the contract turns upon the meaning and application of the words in the price escalator clause—"in the property listed in Schedule A". Said Schedule A lists 154 parcels of land. Appellee subsequently acquired 40 of these parcels at a higher price. Can the clause be construed to mean *"in all or any of the property"* as appellants allege or must it be construed as meaning *"in all the property"* as the District Court held?

The "Memorandum and Order" of the Court below sets forth the basis of its ruling. Citing the parol evidence (integration) rule and its exceptions (interpretation rules) in the case of ambiguity, either patent or latent, the learned judge says:

> "In the instant case, however, there is no ambiguity either extrinsic or intrinsic, in the contract." (Tr. p. 61.)

and further (Tr. p. 63):

> " * * * we cannot read 'in the property' to mean 'in any of the property' * * * Generally speaking, we may say that 'the property,' as used in the present contract, means '*all* the property.' " (emphasis supplied.)

In so holding, and denying appellants the right at a trial to prove what the parties meant by what they said, the District Court erred in the following respects:

1. The so-called "integration" rule—that all prior and contemporaneous negotiations are merged into and expressed by the written agreement—is not involved, although the District Court apparently believed it was involved.

2. In holding "the property," as used in the present contract, means "all the property" and under no circumstances could it mean "any of the property" or "all or any of the property," when the word "the" and the term "the property" have been judicially construed to mean either "all" or "any" depending upon the context and the circumstances under which they were used.

3. The decision ignores or overlooks the fact that the parties place conflicting and opposite meanings on the language; that the language was prepared by appellee and must be construed against it, and that other terms of the contract itself lend support to the appellant's construction of it.

4. Finally, the decision holding "the property" means "all the property" proves the ambiguity, for it

is clearly established that an ambiguity exists whenever it is necessary to add words to a writing to make its meaning clear.

RULES OF CONSTRUCTION WHICH SHOULD HAVE BEEN APPLIED ON MOTION TO DISMISS.

The denial to appellants of a day in Court was not in harmony with the spirit and purpose of the Federal Rules of Civil Procedure. Speaking to the California Bar in 1947, Judge Goodman said (7 F.R.D. 449):

> "In the pleading stage of civil litigation in Federal Courts is found the most beneficial impact of what we may well call the new spirit in Federal Civil Procedure * * *
>
> "The adroit procedural maneuvering of the earlier days in the pleading stage, often invoked to deprive a litigant of his day in court, is now relegated to the archives. Motions to dismiss, motions to strike, motions to make more certain, motions for bills of particulars, while still permissive under the new rules, are, in fact, no longer available as a means of frustration or to delay the final reckoning of trial. The pleading state of litigation should be, and is made simple. Our philosophy now is that only that need be stated that gives a fair notice to the opponent of the general nature of the cause or defense."

See also,

Securities & Exchange Comm. v. Time Trust, Inc., (D.C. Cal. 1939), 28 F. Supp. 34, 41;

Van Dyke v. Broadhurst, (D.C. Pa. 1939), 28 Fed. Supp. 737, 740;

In re Stroh (D.C. Pa. 1943), 52 F. Supp. 958, 961;

Porter v. Shoemaker, (D.C. Pa. 1947), 6 F.R.D. 438, 440;

2 *Moore's Federal Practice,* (2d Ed.) 1605.

In *Topping v. Fry,* (C.C.A. 7, 1945) 147 F. 2d 715, a judgment of dismissal was reversed although "The complaint is so poorly drafted that it is difficult to determine upon what theory the action is based." The Court says at page 719:

> "Under the liberalized procedure provided for by the new rules, we think it is error to dismiss a complaint with prejudice if it appears that any relief could be granted on the facts stated."

A complaint should not be dismissed under Rule 12(b)(6) for "failure to state a claim upon which relief can be granted" unless——

> "It appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim asserted to him."

Cool v. International Shoe Co., (1944 C.C.A. 8th), 142 F. 2d 318, at 320;

Pennsylvania R. Co. v. Musante-Phillips, Inc., (D.C. Cal. 1941), 42 F. Supp. 340, 341;

2 *Moore's Federal Practice,* (2d Ed.), p. 2245.

In *Continental Collieries v. Shober,* (1942, C.C.A. 3d), 130 F. 2d 631, the Court after stating the above rule said at page 635:

> "No matter how likely it may seem that the pleader will be unable to prove his case, he is en-

titled, upon averring a claim, to an opportunity to try to prove it."

On motion to dismiss, the facts alleged are taken as true.

Clark v. Nebersee Finanz-Korp., (1947), 322 U.S. 480, 68 S. Ct. 174, 92 L. Ed. 88.

Here appellants' claim on contract is clearly stated. The contract is set forth in full (Tr. pp. 13-24); the opposing constructions of it are spelled out (Tr. pp. 34, 35); and relief is asked in accordance with the contract terms. (Tr. pp. 39, 40.) All issues had been framed by appellee's answer. (Tr. pp. 42-45.) Depositions of the parties had been taken and filed and the case had been set for trial. (Tr. pp. 80, 81.) Nearly thirteen months had elapsed between the filing of the original complaint on August 23, 1951 (Tr. p. 24) and the judgment of dismissal on September 16, 1952. (Tr. p. 78.) As to the contract claim the amended complaint is identical with the original complaint. (Tr. p. 54.) The District Court granted a motion to dismiss in November (Tr. p. 27), resubmitted his ruling in January (Tr. p. 29) in March deferred further rulings until trial (Tr. p. 41), and finally decided the case in September (Tr. p. 78) *sua sponte,* without trial or pretrial conference. Apparently, appellee was satisfied to proceed to trial for it could have filed a further "speaking motion" for summary judgment under Rule 56 if it had believed the evidence developed in the depositions of the parties did not support appellants' claim. Finally, the District Court could have

resorted to a pretrial conference. The net result of the unusual procedure adopted was to deny to appellants not only a trial but any opportunity to present to the Court extrinsic evidence to support their claim as to the meaning of the contract language.

THE DISTRICT COURT'S CONSTRUCTION OF THE CONTRACT CARRIES NO WEIGHT IN THIS COURT.

In the absence of extrinsic evidence in aid of the construction of a written instrument, an appellate Court is not bound by the trial Court's interpretation and will independently ascertain the meaning of the instrument's provisions from the language thereof as a matter of law.

Transport Oil Co. v. Exeter Oil Co., (1948), 84 Cal. App. (2d) 616, 620;
Moore v. Wood, (1945), 26 Cal. (2d) 621;
Estate of Platt, (1942), 21 Cal. (2d) 343.

In *Trubowitch v. Riverbank Canning Co.,* (1947), 30 Cal. (2d) 335, the rule is stated, at page 339:

> "It is settled in this state that an appellate court is not bound by a trial court's construction of a contract or other written instrument based solely upon the terms of the instrument" (citing cases).

This honorable Court is called upon to examine the allegations of the amended complaint and all provisions of the written contract incorporated therein, and unless this Court is convinced from its own independent consideration thereof that appellants "would be entitled to no relief under any state of facts which

could be proved in support of the claim", it must reverse the judgment herein.

Cool v. International Shoe Co., supra;

Pennsylvania R. Co. v. Musante-Phillips, Inc., supra;

2 *Moore's Federal Practice,* (2d Ed.), p. 2245.

RULES OF INERPRETATION WHICH SUPPORT APPELLANTS' CONSTRUCTION OF THE CONTRACT.

1. A contract must be construed against the party who prepared it.

The amended complaint alleged that appellee prepared the contract. (Tr. p. 38.) Appellee is also the promisor. Also alleged are the opposite interpretations which the parties have placed upon it. (Tr. pp. 34, 35.) Our codes provide the following rules of interpretation:

Civil Code, Sec. 1654. *Words to be taken most strongly against whom.* In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.

Civil Code, Sec. 1649. *Interpretation in sense in which promisor believed promisee to rely.* If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.

Code of Civil Procedure, Sec. 1864. *Of two constructions, which preferred.* When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made.

2. A contract must be construed to avoid an absurdity.

"The property listed in Schedule A" consists of 154 parcels, each of 40 acres or thereabouts, aggregating 6,171.68 acres. (Tr. pp. 18-24.) If "the property" can only mean "all the property" as the District Court held (Tr. p. 63); and if "there is no ambiguity, either extrinsic or intrinsic," as it further held (Tr. p. 61), then it must follow that the price escalator clause, as the District Court construes it, could never operate unless appellee elected to purchase "all" 154 parcels. Operation of the pricing clause depended, in any case, upon a future voluntary act by appellee. Appellee could always escape its own promise by omitting from its future purchase a single parcel, or even a fraction of one parcel!

The result of such a construction is to render the clause meaningless and absurd.

Even had the operation of the clause hinged upon the future act of a third party rather than the promissor, its meaning could not be clear and unambiguous.

Rule 8 (f) requires that "all pleadings shall be so construed as to do substantial justice."

Section 1638 of the *Civil Code* provides:

> *§ 1638 Intention to be ascertained from language.* The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.

Hence, under the above code provision even if we were to concede, as the District Court contends, that the clause is "clear and explicit" we would still reject the construction given by the District Court because it involves an absurdity.

3. A contract must be construed as a whole.

Section 1641 of the *Civil Code* provides:

> *§ 1641. Effect to be given to every part of contract.* The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.

There are other provisions of the contract which support appellants' construction of it.

a. The property listed in Schedule A is not a single parcel or tract of land. If it were one parcel only, the ruling that "the" was intended to mean "all the" would be more plausible. Instead Schedule A lists separately 154 parcels spread over 3 townships and 3 ranges. Although Schedule A as prepared by appellee does not include a map as is usually the case, anyone familiar with section maps can see from the

descriptions that the 154 parcels are not contiguous. (Tr. pp. 18-23.) It becomes relevant and important, therefore, to inquire whether appellee would be apt to purchase the Ducey interest in all 154 parcels or only in those parcels which it needed to cut during the term of the contract.

b. Section 10-(A) first covers the contingency of a direct purchase of the Ducey interest "in the property listed in Schedule A." Later in the same sentence it covers the contingency of a partition sale of "*all* the property described in Schedule A." (emphasis supplied.) The use of all in one instance and its omission in the other certainly does not support the District Court's holding that the parties clearly meant "all" in both instances. To the contrary it must be assumed the parties intentionally omitted "all" in the first instance, and therefore "the property" was not intended to mean *all* the property.

Expressio unius est exclusio alterius.

Jones v. Robertson, (1947), 79 Cal. App. (2d) 813.

c. Reading the contract as a whole it is apparent that the pricing clause was the real consideration moving to seller (appellants), since the purchase price was payable over a term of years, the price escalator clause was intended to fix the real price at the value of sellers' interest to buyer, *as fixed by the buyer,* within such term.

As construed by the District Court, the contract means that the parties intended that during the same

term appellee could pay one price to appellants and a higher price to Ducey for their fractional interests in the same timber. Stated differently, the District Court has read the contract to mean the parties intended that appellee was free to pay one price to appellants and a higher price to Ducey, unless appellee should elect to buy Ducey's interest in every tree on every parcel. This interpretation is unreasonable and it renders the clause ineffective for any practical purpose.

On the other hand, the interpretation which appellants allege, and have been denied an opportunity to prove, gives the pricing clause vitality and meaning.

EVIDENCE IS ADMISSIBLE TO EXPLAIN A PATENT OR LATENT AMBIGUITY.

The District Court erred in denying appellants the right to prove the intended meaning of the contract by evidence of the circumstances prior to and contemporaneous with its execution. The right to prove the contract means what appellants allege it means is clearly conferred by the California Codes.

> *Civil Code,* Sec. 1647. *Contracts explained by circumstances.* A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates.
>
> *Code of Civil Procedure,* Sec. 1860. *The circumstances to be considered.* For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge

be placed in the position of those whose language he is to interpret.

The duty of the Court to ascertain the intention of the parties before construing the contract is equally clear.

> *Civil Code,* Sec. 1636. *Contracts, how to be interpreted.* A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

Also, Section 1859 of the *Code of Civil Procedure* provides "* * * and in the construction of the instrument the intention of the parties, is to be pursued, if possible * * *."

See also,

> *Restatement of the Law of Contracts,* Secs. 230, 235;
>
> *Wachs v. Wachs* (1938) 11 Cal. (2d) 322.

The District Court's judgment is based upon the so-called "integration" rule (*Civil Code,* Section 1625; *Code of Civil Procedure,* Section 1856), by which a written agreement supersedes all prior and contemporaneous negotiations or stipulations (Tr. pp. 60, 61) and its corollary, that if the language is clear and explicit, the intention of the parties must be ascertained from the writing alone (Tr. p. 63). The Court below refers to the so-called "interpretation" rules (Tr. p. 61) permitting extrinsic evidence to explain patent or latent ambiguity, but the Court says that neither exists. (Tr. p. 61.)

Patent ambiguity is dismissed with the statement "There is absolutely no warrant for asserting that the words 'fractional interest of John F. Ducey in the property' were 'written blindly or imperfectly' or that their meaning is 'doubtful'." (Tr. p. 63.)

It seems unnecessary and inappropriate to restate at this point the reasons which bear out appellants' opposing interpretation, nor to cite to this Court many cases in which the Courts have liberally applied the interpretation rule as to patent ambiguity to the writings before them. This Court had a similar situation in *Hanney v. Franklin Fire Ins. Co. of Philadelphia* (1944 C.C.A. 9th) 142 F. (2d) 864, an action upon an insurance policy, and for reformation of it. Each party claimed the policy was clear but they disagreed as to its meaning. The trial Court dismissed under Rule 12 (b) and this Court reversed.

Latent, or extrinsic ambiguity is dismissed by the District Court with the statement that none exists. (Tr. p. 61.) To the contrary, we maintain that even if no ambiguity existed on the face of the contract as the District Court contends, appellants are certainly entitled to prove that an extrinsic or latent ambiguity arose after the contract was signed by appellee's purchase of the Ducey interest in part of the property, and to explain its meaning in the light of this subsequent event.

Parol evidence is admissible to show that a latent ambiguity exists, and to explain it.

Pacific Ind. Co. v. California Elec. Works (1938) 29 Cal. App. (2d) 260, 272;

Estate of Donellen (1912) 164 Cal. 14;
Estate of Domencini (1907) 151 Cal. 181.

Language which is clear when written may become ambiguous in the light of future events.

F. P. Cutting Co. v. Peterson (1912) 164 Cal. 44;
Barham v. Barham (1949) 33 Cal. (2d) 416.

The *Barham* case, supra, involved the interpretation and effect to be given to a property settlement agreement in the light of a remarriage and divorce. There was no ambiguity in the agreement.

In *Millet v. Taylor* (1914) 26 Cal. App. 161, parol evidence was held admissible to prove that "one equal half part of all the proceeds," as used in a lease, meant one half the *net* proceeds. The Court said this was "a latent ambiguity."

Under the District Court's ruling here one may wonder how an extrinsic ambiguity could be shown to exist in any case when the Court felt the language of the writing to be clear!

ADDING "ALL" TO THE CONTRACT IN ORDER TO CLARIFY ITS MEANING IS PROOF OF THE AMBIGUITY.

In support of its construction of the contract the District Court says (Tr. p. 63):

> "Generally speaking, we may say that 'the property,' as used in the present contract, means 'all the property'."

Not only was the learned judge in error in deciding that *"the"* must mean, or that it generally does

mean, *"all the,"* but he erred also in deciding that "In the instant case, however, there is no ambiguity," (Tr. p. 61) when he found it necessary to read "the" to mean "all the."

> "Once something has to be read into a contract to make it clear, it can hardly be said to be susceptible of only one interpretation."
>
> *Union Oil Co. v. Union Sugar Co.* (1948) 31 Cal. (2d) 300, at p. 306. (Reversing trial Court's construction of written contract, though based on conflicting evidence of intent.)

And the comment in the above case at page 306 is particularly applicable:

> "It would have been error for the trial court to read something into the contract by straining 'to find a clear meaning in an ambiguous document, and having done so exclude the extrinsic evidence on the ground that so construed no ambiguity exists'."
>
> *Body-Steffner Co. v. Flotill Products* (1944) 63 Cal. App. (2d) 555, 562.

The *Body-Steffner* case, supra, is notable not only as indicating how carefully the California Appellate Courts reexamine the trial Courts' construction of an instrument, but in addition, the latitude permitted in the use of extrinsic evidence to aid the Court in deciding its intended meaning. In reversing, for refusing to receive extrinsic evidence that contract language had an opposite meaning by custom and usage, the Court says, at page 562:

"Our conclusion that these contracts are ambiguous on their face makes it unnecessary for us to determine in this case whether parol evidence should not be admitted in every case to show the sense in which the parties used the language embodied in their contracts, even though the language used would normally have a clear and settled meaning. There is a considerable body of opinion among students of the subject whose conclusions are entitled to the greatest respect that parol evidence should always be admissible to show the sense in which the contracting parties used and understood the language of their written contracts (cf. concurring opinion of Traynor, J., in *Universal Sales Corp. v. California, etc. Mfg. Co.,* (1942) 20 Cal. (2d) 751, 776."

"THE PROPERTY" HAS NO PRECISE MEANING.

Cases defining the word "the" well illustrate that "the" has no exact meaning, and that the word must be interpreted in light of the context in which it is used. In the case of

Anundsen v. Standard Printing Co. (Iowa, 1905) 105 N.W. 424,

the Court held that the words "the property," as used in an Iowa statute giving preference to labor claims "when the property of any company * * * shall be seized * * *," did not mean "all of the property." After observing that the word "the" has sometimes been construed to mean "all of the" and sometimes not, the Court said at page 426:

"But at most, it is nothing more than a definitive adjective, as opposed to an indefinite article.

> * * * And there seem to be no settled rules for its construction. Much must of necessity be left to the context, and to the objects and purposes of the statute in which it is found."

In

Howell v. State (Ga. 1927) 138 S.E. 206, 210, the Court held that the words "the warden" as used in a statute providing who should serve as executioner, meant "any warden," so that although the state penitentiary had three wardens, any one of them could serve. While agreeing that grammatical niceties should not be resorted to without necessity, the Court observed that in the construction of statutes the Courts should apply common sense and not the logical refinement of the schoolman.

The California Courts have had occasion to define "the" to mean "any" in at least two instances. In the case of

Craig v. Boyes (1932) 123 C.A. 592, 596,

it was held that the words "the proximate cause," as used in the California Guest Law, means "a" proximate cause of injury. The Court referred to numerous authorities including *Noyes v. Children's Aid Society,* 70 N.Y. 481, 484, and the *Anundsen* case, *supra;* it quoted the above quoted passage from the *Anundsen* case with approval and then said that the quoted rule was applicable to the case before it.

And in

City of Oakland v. Hogan (1940) 41 C.A. (2d) 333,

it was held that the Port Commission of Oakland was the legislative body of the City of Oakland within the language of C.C.P. Section 811: "the legislative body of any municipal corporation," although it is primarily an administrative body and not the principal legislative body of that city. In so holding, the Court reversed a judgment for defendants based on an order sustaining their demurrers to the amended complaint. The effect of the decision is a holding that "the legislative body" means "a legislative body." With respect to the meaning of the word "the" the Court cited the *Noyes* and *Craig* cases, supra, and said, at page 343:

> "* * * An examination of the citations *pro* and *con* leads to the conclusion that its context and the apparent intent of the party or parties responsible for the use of the italicized word control in its interpretation and construction rather than the strict grammatical definition of the word."

The cases cited above demonstrate the error of the District Court in its holding that "the property" means "all the property," and that extrinsic evidence is inadmissible to prove that it was intended to mean "any of the property."

II. THE AMENDED COMPLAINT STATES A CLAIM ON WHICH RELIEF CAN BE GRANTED BY WAY OF REFORMATION.

As the Court below has noted (Tr. p. 34) the only difference between the original and the amended

complaints is contained in the allegations of paragraph XI of each with respect to a claim for reformation. The original alleged both a mutual mistake and a unilateral mistake. (Tr. pp. 9-12.) The allegations were held defective for failure to allege an agreement other than the writing to which it could be reformed. (Tr. p. 27.) There is no point, of course, in arguing as to error in the Court's ruling on the original complaint. We concede that *as a matter of proof as distinguished from a matter of pleading,* it is necessary in the case of *mutual* mistake to show an antecedent agreement to which the writing can be reformed.

The amended complaint omits any claim of mutual mistake. (Tr. pp. 35-39.) It states a claim under *Civil Code* Section 3399 for a mistake of appellants which was known or suspected by appellee when the contract was signed. It states that appellants executed the agreement under the understanding and belief that it meant "Ducey's interest in all of or any of said lands." Circumstances leading up to the contract which support appellants' understanding of it are set forth. The final allegation is that appellants "at all times prior to, and at the time of executing said agreement understood and believed and defendant corporation at all times knew or suspected that plaintiffs under the terms of said agreement understood and believed that plaintiffs would receive the difference between $75.00 per acre and any higher price per acre which might be agreed upon between

defendant corporation and John F. Ducey at any time prior to July 1, 1950." (Tr. p. 39.)

The District Court has dismissed these allegations without leave to amend. The relative portion of the Court's opinion is preceded by a heading averring that appellants "have not made a showing that entitles them to a reformation." (Tr. p. 66.) The opinion says the allegations are "replete with details"; that the opening statement "is merely one of an ultimate fact"; and that the final allegation is "most lame and impotent" because it did not repeat the opening averment that they understood the agreement covered Ducey's sale of his fractional interest "in less than all of the lands." (Tr. pp. 67, 68.)

Appellants' claim is, first, that the contract prepared by appellee means they should receive the benefit of any better deal which appellee might make with Ducey and secondly, if it cannot be so construed, it should be reformed because appellants so understood its meaning and appellee knew or suspected they so understood its meaning. This claim is abundantly clear from the pleading. The pleading is drawn in the language of Section 3399 of the *Civil Code.*

The *real basis* of the District Court's ruling however, rests not upon the language of the amended complaint, but upon the erroneous premise that appellants "must plead and prove a definite agreement that pre-existed the instrument sought to be corrected." (Tr. p. 69.) Thus the Court returned to its ruling of November 7, 1951, dismissing the

original complaint which alleged both mutual mistake and unilateral mistake. (Tr. p. 27.) The Court below could see no difference between stating a claim for mutual mistake and a claim for unilateral mistake. In either case plaintiffs must *plead* a definite pre-existing agreement.

The District Court erred:

1. In failing to distinguish between mutual mistake and "a mistake of one party, which the other at the time, knew or suspected."

2. In applying what the Court believed to be the California rule as to pleading and proof to a motion for failure to state a claim under Rule 12 (b).

3. In dismissing the amended complaint with prejudice.

Civil Code, Section 3399 confers separate, distinct and alternative rights of action for mutual mistake and "a mistake of one party, which the other at the time knew or suspected." The difference is noted by the courts.

Auerback v. Healy (1916) 174 Cal. 60, 63;
F. P. Cutting v. Peterson (1912) 164 Cal. 44, 50;
Burton v. Curtis (1928) 91 Cal. App. 11, 13;
Bank of America v. Granger (1931) 115 Cal. App. 210, 220;
Eagle Indemnity Co. v. Industrial Acc. Comm. (1949) 92 Cal. App. (2d) 222, 229.

Here, after protracted negotiations, appellee prepared a written proposal and sent it to appellants

who signed it. (Tr. p. 38.) The District Court held in effect that such a writing can never be reformed for a mistake of one party which was known to the other because "the plaintiff must plead and prove a definite agreement that preexisted the instrument." The District Court is clearly in error. It is not necessary to plead and prove two agreements.

The rule applicable is clearly stated in the *Eagle Indemnity* case, supra, which upheld reformation of an insurance policy for mistake of one party known to the other. The Court says at page 229:

> "Petitioner argues that the commission by ordering reformation of the policy created a new contract for the parties. Of course, reformation cannot be ordered so as to create a new and different contract for the parties (22 Cal. Jur. 710) but where, as here, the case falls within the language of Civil Code, section 3399, 'when through * * * a mistake of one party, which the other * * * knew or suspected, a written contract does not truly express the intention of the parties * * *' *the contract which was intended by the party acting under unilateral mistake known or suspected by the other, is, as a matter of law, the contract of the parties.* (Bank of America v. Granger, 115 Cal. App. 210, 220.)" (Emphasis supplied.)

In the *Granger* case, supra, suit was based upon a written guaranty in favor of an extinct corporation and for reformation of it for mutual mistake. A judgment for defendant was reversed on appeal. In distinguishing mutual mistake from unilateral mistake, the Court said at page 220:

"The defendant Thomas contends that the defendants knew whom they were guaranteeing in that they intended to guarantee only the United Bank and Trust Company of California. We do not think that is the record. However, for the purposes of this decision, assuming such to be the record, then the only effect is to rest the case on a harsher clause contained in our statute.

There is certainly no evidence that the plaintiff or its predecessors in interest actually intended to obtain guaranties running in favor of a corporation extinct. Addressing itself to a similar contention in the case of *F. P. Cutting Co. v. Peterson,* supra, on page 50 of 164 Cal. (127 Pac. 163, 165), the court said: 'If they had declared that they did not then expect that the price list would be printed and that they approved the wording with that idea, it would be a virtual confession that they believed that the guaranty would be nugatory and intended to perpetrate a fraud upon the defendant if a lower price was fixed by the association without printing the price list. The mistake would then come within the class of mistakes described in section 3399 as "a mistake of one party, which the other at the time knew or suspected".' The point is without merit."

See also, 22 Cal. Jur. 721;
Burton v. Curtis, supra;
Starr v. Davis (1930) 105 Cal. App. 632;
Stevens v. Holman (1896) 112 Cal. 345.

The opinion of the Court below cites only two cases, *Auerback v. Healy* (1916) 174 Cal. 60, and

Bailard v. Marden (1951) 36 Cal. (2d) 703, in support of the proposition that appellants must "plead" "a definite agreement that preexisted the instrument." Each of them was discussed by *both* parties in the briefs below and neither supports the proposition.

Both the *Auerback* and *Bailard* cases came before the appellate Court after a trial on the merits, not at the pleading stage.

The *Auerback* case did not involve a mistake of one party known to the other, but a mutual mistake because a draftsman failed to insert a block number in a deed. That the portion of the opinion quoted by the District Court (Tr. p. 69) refers to pleading *mutual* mistake is clear from what immediately follows at page 63 of 174 Cal.:

> "It is necessary to aver facts showing how the mistake was made, whose mistake it was, and what brought it about, *so that the mutuality may appear.*" (emphasis supplied.) "* * * In this state mutuality is not always necessary. It is sufficient if there was 'a mistake of one party, which the other at the time knew or suspected.' (Civ. Code, sec. 3399.) But the *facts* showing a mistake of that character, *in such a case,* must likewise be alleged." (Emphasis ours.)

Thus it is clear the *Auerback* case does not support the theory of the District Court. Even the above dicta as to unilateral mistake says only that under rules of pleading in the state Court the *"facts"* must be alleged—not "a definite agreement that preexisted the instrument," or two agreements.

In the *Bailard* case the plaintiffs did plead both mutual and unilateral mistake but the portion of the opinion quoted (Tr. pp. 70, 71) clearly refers to reformation based on *mutual* mistake, and to the proof rather than the pleading. The opinion deals with the evidence and the findings rather than sufficiency of the pleading. The Court apparently agreed with the defendant's contention that the evidence did "not support the conclusion that the transaction was based upon a mutual mistake," and that there was no evidence "of any knowledge or suspicion by them" (the defendants) of any mistaken belief by plaintiffs. The opinion in the *Bailard* case does not cite any of the cases which we have cited and quoted above, and the language of the opinion cannot be taken to overrule them.

In effect, the District Court held that reformation can never be obtained where, as in the case at bar, one party prepares a written agreement and submits it to the other who signs it, because the claimant "must plead and prove a definite agreement that pre-existed the instrument sought to be corrected." (Tr. p. 69.)

The District Court's opinion quotes correctly a statement in one of our briefs below. (Tr. p. 69.) We reiterate, we have been unable to find any California case holding that in pleading a cause of action for a mistake of one party which the other at the time knew or suspected, it is necessary to allege an agreement preexisting the written instrument. And, of course, we have found no authority to support the

theory that such an allegation is necessary to state a claim under the Federal Rules of Civil Procedure.

III. THE CLAIM FOR RELIEF BY WAY OF REFORMATION IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The District Court ruled that the amended complaint shows on its face that the action for reformation of the contract is barred by the three year statute of limitations, *California Code of Civil Procedure,* Section 338. (Tr. pp. 71-76.) It is submitted that this ruling is clearly erroneous.

The amended complaint reveals on its face the following facts relevant to this point:

Appellants are residents of the State of New York. Appellee is a Delaware Corporation with its principal office and place of business at Kansas City, Missouri. It transacts business in California. The timber lands in question are in California. John F. Ducey is a resident of Detroit, Michigan. (Tr. pp. 29-31.) The purchase by appellee of the Ducey fractional interest occurred December 9, 1947, which fact was discovered by appellants in February, 1949. (Tr. p. 33.) The contract between the parties required appellee to notify appellants of its purchase of the Ducey interest, which notification provision reads as follows:

> "(B) The purchaser further agrees with the Seller that, in the event it should purchase the said John F. Ducey interest at any time on or before July 1, 1950, that it will, within fifteen (15) days after making said purchase, mail to the

address of the Seller, notice of said purchase and the terms and conditions of same." (Tr. p. 17.)

Appellee never gave notice as required by this provision.

Section 338 of the *Code of Civil Procedure* provides, in part, as follows:

"338. Within three years:

* * * * * * *

4. An action for relief on the ground of fraud or mistake. The cause of action in such case shall not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the mistake."

The discovery was made well within three years of the filing of the original complaint. The District Court casts some confusion on this by pointing out that the original complaint was filed more than five years after the execution of the purchase agreement. (Tr. p. 73.) This fact has no relevancy to the point here in issue. It is further to be observed that the Court made no mention of the limitations question in its orders dated November 7, 1951 (Tr. pp. 26-27), January 3, 1952 (Tr. pp. 28-29), and March 26, 1952. (Tr. p. 41.) The point was first made in the memorandum preceding the judgment herein appealed from.

The District Court stated that the amended complaint should have contained facts showing why the alleged mistake, in the exercise of reasonable dili-

gence, was not discovered until a time within the limitations period. It is submitted that sufficient facts, as reviewed above, have been alleged to relieve appellants of the bar. *The notice provision could have only one purpose,* i.e., to require appellee to notify appellants in New York of a California transaction with Ducey, a Michigan resident. It it were necessary under the Federal Rules to add a further statement that appellants relied on said notice provision, then the Court should have afforded appellants an opportunity to amend their complaint to include such allegation. The defect, if it is a defect, was equally apparent in the original complaint but the Court ignored it.

With respect to the failure of appellee to give the notice required of it, and appellee's defense of the statutory bar (Tr. p. 45), the rule is settled that the doctrine of equitable estoppel will prevent a defendant from relying on the statute of limitations where the defendant previously, by deception or any violation of duty toward plaintiff has caused plaintiff to permit the statutory period to elapse. In such cases it is held that the defendant has wrongfully obtained an advantage which the Court will not allow him to hold. Estoppel to plead limitations may arise from agreement of the parties, from defendant's conduct, or from his silence when under an affirmative duty to speak.

56 *Corpus Juris Secundum* pp. 962-964;

Verdugo Cañon Water Co. v. Verdugo (1908) 152 Cal. 655, 681-684;

Miles v. Bank of America N.T. & S.A. (1936) 17 Cal. App. (2d) 389, 397-398.

In the *Verdugo* case, supra, the Court, after noting that active fraud or deceit is not essential to invoking estoppel, quoted with approval the following from *Thompson v. Simpson,* 128 N.Y. 289, 28 N.E. 632:

> "'An estoppel may arise also from silence as well as words. But this is only where there is a duty to speak, and the party upon whom the duty rests has an opportunity to speak, and knowing the circumstances require him to speak, keeps silent.' And upon the subject of duty it is further said: 'It is not necessary that the duty to speak should arise out of any agreement, or rest upon any legal obligation in the ordinary sense. Courts of equity apply to the case the principles of natural justice, and whenever these require disclosure they raise the duty and bind the conscience and base upon the omission an equitable forfeiture to the extent necessary to the protection of the innocent party.'"

The District Court took note of appellants' reliance upon the notice provision of the contract and commented as follows:

> "The short answer to this contention, of course, is that the defendant did not purchase the Ducey interest *in all of the* property, but only in a part of it. * * * Since the defendant did not purchase the Ducey interest *in all of the lands,* it was not required to give the plaintiffs the notice specified in Section 10-(B)." (Tr. p. 75.) (Emphasis supplied.)

Again the District Court "read something into the contract," a practice condemned in the *Body-Steffner* case, supra. In this instance it has added to the notice provision (section 10-(B)) the words "in all of the property" in order to construe it against appellants. In the first instance the Court held appellants have no claim under the contract because "in the property" means "in all the property." In this second instance the Court held appellants' claim to reform the contract is barred by limitations because, in the clause requiring notice for their protection, the words "the said John F. Ducey interest" means the said John F. Ducey interest "in all of the property."

It seems unnecessary to restate here the reasons contained in foregoing portions of this brief which demonstrate the Court's error. In construing sections 10-(A) and 10-(B) the Court read something into the contract to make its meaning clear, and having done so, has excluded all evidence on the ground that so construed no ambiguity exists.

See

Union Oil Co. v. Union Sugar Co., supra;
Body-Steffner Co. v. Flotill Products, supra.

In each instance appellants have been ushered out of Court at the pleading stage and denied an opportunity to prove their claim.

IV. THE DISTRICT COURT ERRED IN DECIDING THIS CASE ON ITS MERITS AT THE PLEADING STAGE.

The decision of the District Court was most unusual. The Court has in effect decided the case on its merits at the pleading stage without permitting appellants to have their day in Court.

After the case was at issue the Court could have resorted to a pretrial conference. If the appellee had so desired it could have filed a motion under Rule 56 —a so-called "speaking motion"—whereby the Court would have been properly informed as to the positions of the respective parties, the evidence which they or it considered material or decisive, and the testimony to be adduced could have been explored in the light of the depositions of the plaintiffs and the officers of defendant corporation which were on file with the Court.

Instead of resorting to such regular and normal procedure the District Court, on its own initiative, reversed its prior ruling on the motion to dismiss and rendered judgment for appellee corporation. The memorandum and order preceding the judgment reveals that the Court was persuaded to take this action by consideration of other pleadings in the case, whereas a motion to dismiss under Rule 12 (b) (6) —like the old general demurrer—is addressed only to the pleading attacked, which in this case, was the amended complaint.

CONCLUSION.

It is respectfully submitted that the judgment should be reversed with directions to the District Court to set the case for trial on the claims for recovery upon the contract and, in the alternative, for reformation of the contract.

Dated, San Francisco,
March 16, 1953.

Respectfully submitted,
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